

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH, SS-Northern District

AUGUST TERM, 2008

THE STATE OF NEW HAMPSHIRE

V.

MICHAEL ADDISON

07-S-0254

Defendant's Objection to State's Motion in Limine #12

Michael Addison objects to the State's Motion in Limine #12, in which it seeks to bar him from making an unsworn statement before the jury at the sentence selection phase of this proceeding. It would be fundamentally unfair to deny Addison the opportunity to address the jury that is considering sentencing him to death. N.H. Const. pt. I, arts. 15, 18, 33; U.S. Const. Amends. V, VIII, XIV.

As grounds, Mr. Addison states:

1. The State seeks to bar Addison from making an unsworn statement to the jury during the sentence selection phase. The State contends that the right to deliver such a statement is not guaranteed by the state or federal constitutions nor contemplated under the death penalty statute. It relies heavily on the proposition that Addison's presentation of an unsworn statement would frustrate its statutory right of rebuttal.

2. The federal constitution does not currently recognize, nor explicitly reject, a right of allocution in the specific context of a capital case. See, e.g., State v. Colon, 866 A.2d 666, 789-

92 (Conn. 2004), cert. denied, 546 U.S. 848 (2005)(reviewing federal cases). Addison submits that in a capital case, such a federal constitutional right derives primarily from the ability to present any mitigating factor in a capital sentencing proceeding that may cause even one juror to impose a sentence of life without the possibility of parole, instead of death. See Paragraph Nine, infra; Lockett v. Ohio, 438 U.S. 586, 604 (1978). He therefore relies on the federal constitution in the event that federal law clarifies to his benefit during the pendency of this proceeding, or any appeal from a death verdict.

3. Nonetheless, Addison notes that some federal district courts have allowed allocution in capital cases in an exercise of their discretion. For example, in United States v. Wilson,¹ 493 F.Supp.2d 509, 510 (E.D.N.Y. 2007), the court held, “[i]n a capital case, in which a defendant’s fate is determined by a jury, permitting a defendant to speak to the court before the court imposes his sentence [as federal rules permit], but not to the jury before it determines that sentence, would afford capital defendants an “empty formality” rather than the substantive right afforded non-capital defendants. United States v. Chong, 104 F.Supp.2d 1232, 1234 (D.Haw. 1999). Such a disparity would be unjust.” Nothing prevents the Court from exercising its discretion in similar fashion here.

4. Addison agrees that allocution was a right at common law. He does not agree that it is extinct. To the contrary, since no rule of evidence eliminates the right of allocution, see N.H. R. Evid. 101, that common law right has not been extinguished. While New Hampshire, unlike some other states, has no formal allocution rule, New Hampshire judges routinely, if not uniformly, permit the defendant to address the court before the imposition of sentence without

¹The State relied on Wilson in support of its motion to compel the defense to list mitigating factors.

the necessity of taking the witness stand, whether the issue of sentence is contested or negotiated with the State.² As the Wilson Court recognized, it would be anomalous if a defendant facing a few days of incarceration had the ability to express his remorse for his offense to the sentencing judge as she deliberated the appropriate sentence, but a defendant facing death did not.

5. Other courts have noted the fundamental unfairness of denying allocution in the capital context. “The right of allocution reflects our commonly-held belief that our civilization should afford every defendant an opportunity to ask for mercy. . . . Exercising that right would allow the jury to hear from the defendant’s voice that he is an individual capable of feeling and expressing remorse and of demonstrating some measure of hope for the future.” State v. Harris, 859 A.2d 364, 482 (N.J. 2004)(quotations omitted), cert. denied, 545 U.S. 1145 (2005).

6. Indeed, in a case relied on by the State, that court made clear that there is a split of authority with regard to the ability of a capital defendant to address his sentencing jury. Duckett v. State, 919 P.2d 7, 21 n. 3-5 (Okla. Cr. 1995), cert. denied, 519 U.S. 1131 (1997). Aside from New Jersey, the common law right to allocution is recognized in the capital context in Maryland (Harris v. State, 509 A.2d 120 (Md. 1986)),³ Washington (State v. Lord, 822 P.2d 177 (Wash. 1991)), Nevada (State v. Homick, 825 P.2d 600 (Nev. 1992), cert. denied, 519 U.S. 1012 (1996), and Mississippi (Williams v. State, 445 So.2d 798 (Miss. 1984), cert. denied, 469 U.S. 1117 (1985)). In addition, a decision of the Supreme Judicial Court of Massachusetts seems to suggest a right of allocution applies in capital cases. Jeffries v. Commonwealth, 12 Allen 145, 1866 WL

²In the El Mexicano case, the Court heard a statement from Jeffrey Hayes before it imposed sentence. The Court appeared to rely on that statement in sentencing Hayes to one year less of incarceration in prison than the State recommended.

³In so ruling, the court observed that “even “[t]he most persuasive counsel may not be able to speak for a defendant as the defendant himself might, with halting eloquence, speak for himself.” Id. at 127 (quoting Green v. United States, 365 U.S. 301, 304 (1961)).